No. 14113

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED TRUCK LINES, INC., a corporation, and OREGON - WASHINGTON TRANSPORT, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

By an information filed in the United States District Court for the District of Oregon, defendants (appellants here) were charged with violation of the Interstate Commerce Act, Part II, Section 306(a), Title 49, U.S.C.A., and Section 2, Title 18, U.S.C.A. Jurisdiction of the District Court was invoked under Section 3231, Title 18, U.S.C.A.

Jurisdiction of the Circuit Court of Appeals is invoked under Section 1291, Title 28, U.S.C.A.

PRELIMINARY STATEMENT

We are mindful that there is only one issue presented on this appeal and we are aware of the limitations imposed upon us before an Appellate Court with reference to the facts of record. However, the determination of the issue involves the explanation of various subordinate factors which we feel the appellants have not only confused but have distorted. These inaccuracies will be discussed in their time order and reference to the record will be made to support our claim of error. The trial judge heard and considered the matters hereinafter set out and it is felt that a re-statement of the salient facts there heard will supply a "void" which we think appears in appellants' brief. We feel that this Court, upon argument, would inquire about unstated facts and expect to be informed concerning them.

As far as pertinent here, United Truck Lines, Inc. (hereinafter called United), under a certificate of public convenience and necessity, issued by the Interstate Commerce Commission, has authority to serve all points in Benton County, Washington. It does not possess authority to serve any point in Oregon in the considered area and specifically Umatilla County, Oregon. (Stip. of Facts, par. X, R. 19). (These counties lie directly opposite of each other on either side of the Columbia River).

For the purpose of construction of the McNary Dam across the upper Columbia River, the United States Government pre-empted certain lands on both sides of

the river. This land in Washington lies partly in Benton County; and in Oregon, partly in Umatilla County. The land so taken is referred to as the McNary Dam Reservation. Construction of the dam was commenced on the Washington side in Benton County. United, under its common carrier authority, could and did serve and transport property to that part of the construction project. When construction was transferred to the Oregon side, United extended its service to that part of the dam site lying in Umatilla County.

It reached Umatilla County by crossing its vehicles over the Columbia River on a ferry owned and operated by Umatilla Ferry, Inc., a private corporation. We do not think the following point is material, but, after reaching the Oregon shore, United, purportedly to "legalize" its service to the McNary Dam Reservation—the closest boundary of which was some ¼ mile from the ferry landing—secured a right of way and constructed a private road which it traversed over this area. (Stip., par. X, R. 20).

Subsequently, for reasons best known to United, it "discontinued" service to the dam reservation located in Umatilla County and entered into an arrangement to interchange such freight as destined to that area at a point in Benton County with Oregon-Washington Transport, who has authority to serve both Benton and Umatilla Counties. That is how Oregon-Washington became involved in this proceeding. The alleged illegal operation under that arrangement formed the basis for the filing of the information against both carriers. The adjudica-

tion of the Court below on that matter is not in issue here.

Further, appellants, in their brief, make repeated reference to "a government owned island (Umatilla Island)" as the Oregon terminus of the ferry operation. A substantial portion of appellants' argument is based upon the fact that this island is government owned. The implications arising therefrom and the erroneous conclusions expressed in connection therewith require that this "island" be identified.

"Umatilla Island" is a plat of land containing 62.73 acres. At one time the waters of the Columbia River completely surrounded it. Its position was close to the Oregon shore. Accordingly, under Public Law, and in 1905, the Secretary of the Interior withdrew the land (island) from the public domain for use and in aid of reclamation purposes. Sometime between 1905 and 1949 two things happened, e.g.: (1) a natural change in the course of the Columbia River caused a receding of waters on the Oregon side and the area ceased to be an island—it became attached to the shore lands; however, the area is still referred to as Umatilla Island; (2) the Bureau of Land Management of the Department of the Interior seemingly forgot that the land had been reserved to the Federal government. For some considerable time the Ferry Company paid a rental to the State Land Board of Oregon for the part of the land it used for ferry purposes. On September 15, 1952, the Bureau of Land Management leased the island to the River Terminals Company, a bulk petroleum facility. Two

restrictions, amongst others, were imposed upon the lessee, namely, (1) that the lessee's use of the land "shall not interfere with the operation of the Umatilla-Plymouth ferry", and (2) the privilege of removing sand and gravel by the Corps of Engineers (McNary Dam). It is admitted that Umatilla Island is under the jurisdiction of a governmental agency.

No reference is made in the pre-trial Stipulation of Facts concerning "Umatilla Island" because its government status was not known at that time. The discovery was made in the latter course of the proceedings and the trial judge, then, required counsel to make a full inquiry of its status, which was done and presented to the Court in form of supplemental briefs. See: Stip. par. III, R. 17).

STATUTES INVOLVED

The Interstate Commerce Act, Part II, Section 306 (a), Title 49, U.S.C.A., provides:

> ". . . No common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation *on any public highway, or within any reservation under the exclusive jurisdiction of the United States,* unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations . . ." (Emphasis supplied).

Section 303(a) (12), Title 49 U.S.C.A., defines:

> "The term 'highway' means the roads, highways, streets and ways in any state."

QUESTION PRESENTED

That the appellants traversed the Columbia River and served a point in Umatilla County is admitted. (Stip., par. XI, R. 20). In crossing the river the services of the Umatilla ferry were utilized. The question presented, then, is: whether or not the operation across the Columbia River was "an operation on any public highway" within the meaning of Section 306(a), Title 49, U.S.C.A.

Appellants admit this is the only question presented (App. Br. 6); however, they have presented a separate and different question under the title *"Appellants were not engaging in an interstate operation on the ferry"* (App. Br. 25). We contend that the argument there advanced is wholly irrelevant. We have taken the opportunity, though, to reply thereto in order to correct mistakes, both as to the facts and the law, which we feel may be confusing to the Court in its determination of the single issue presented.

SUMMARY OF ARGUMENT

Appellants present their argument under the headings designated as:

1—This ferry is not a highway (Br. 9).

2—This ferry is not a public highway (Br. 21).

3—Appellants were not engaging in an interstate operation on the ferry (Br. 25).

Since the argument advanced under specifications (1) and (2) go directly to the issue involved, answer will be made generally by reference thereto in this brief. However, the position of the appellants with respect to specification (3) is so palpably in error, both as to facts and law, that special answer thereto will be made.

It is appellee's contention that:

I. *The Umatilla Ferry is a public ferry.*

The articles of incorporation of the ferry company state that the business which it proposes to engage in is to do a general ferry business for charge and toll. The company, in fact, not only holds itself out to the public to perform a general service, but does serve a heavy volume of unrestricted traffic. It pays a transportation tax as a public carrier to the Department of Internal Revenue.

II. *The absence of regulation does not, in law, affect the public nature of the ferry.*

As a matter of law, the absence of regulation does not determine the status of a facility. It becomes a public one by virtue of its occupation and performance in the public interest and not by virtue of the responsibilities under which it rests.

III. *The Umatilla Ferry is a public highway within contemplation of Section 306(a), Title 49, U.S.C.A.*

The objective intendments of the statute so require such determination and the authorities support such a status. We are dealing here with the act of transportation and not with the ferryboat as such.

IV. *Appellants operated within the State of Oregon over a public highway.*

Title to navigable waters is reserved to the sovereignty of the respective states. Oregon under its Admission Act, approved by Congress, retained title to the middle channel of the Columbia River and its territorial limits extend to that area.

ARGUMENT

I.

THE UMATILLA FERRY IS A PUBLIC FERRY

The Articles of Incorporation of Umatilla Ferry, Inc. provide that "the object of this corporation, the business in which it proposes to engage, is . . . to own and operate a ferry business for the purpose of carrying and transporting freight, passengers, baggage and express and do a general ferry business for hire and for toll . . ." (R. 13). It advertises a 24 hour service to the public generally (R. 18). It charges a uniform toll for passenger cars and trucks (R. 19). It pays a transportation tax as a public carrier to the Department of Internal Revenue (R. 19). During two representative months, namely: December, 1952—the ferry transported 5,522 passenger cars and 300 trucks; and, for October, 1952—it transported 10,034 passenger cars and 550 trucks, or an over-all total for the two months of 16,406 vehicles. Admittedly, the ferry is privately owned.

The first and leading case pertinent to the proposition of public versus private facilities is *Munn v. Illinois,*

94 U.S. 113. In that case 9 different warehouses in Chicago were performing a service in the transit storage of grain moving from the west to the east. The state of Illinois enacted a regulatory law with respect to them which among other things set a maximum charge for storage rates. One of the warehousemen, Munn, challenged the law on the grounds that the warehouses, being privately owned and operated, were not subject to state control. Inquiry by the Court was directed at the actual service performed and in upholding the right of the state to regulate, the Court said (pg. 132):

> "Certainly if any business can be clothed with a public interest, and cease to be juris private only, this has been. *It may not be made so by the operation of the Constitution of Illinois or by this statute, but it is by the facts.*" (Emphasis supplied).

Further, in the *Munn* case, the Court, in exploring the proposition before it, observed:

> "The function of ferries has been recognized in England from time immemorial and in this country from its first colonization . . . when private property is affected with a public interest it ceases to be juris private."

The distinction between a public ferry and a private ferry is pointed up when the factual circumstances surrounding the creation and actual operation of the Umatilla ferry is viewed in relation to the definition of a private ferry as contained in 22 Am. Jur., page 553, Section 2:

> "A private ferry is mainly for the use of the owner; and, although he may take pay for ferriage, he does not follow it as a business."

The Umatilla ferry company was incorporated for the sole purpose of conducting "a general ferry business for hire and for toll"; and, pursuant thereto, it established a ferry facility and extended its service to the public generally who in turn utilized the service in keeping with the primary purpose of the business.

II.

THE ABSENCE OF REGULATION DOES NOT, IN LAW, AFFECT THE PUBLIC NATURE OF THE FERRY

It was stipulated and agreed that the ferry operation is not regulated by any governmental agency and that the company does not possess a franchise, license or certificate of any nature whatsoever (R. 12). It is appellee's position that absence of regulation or of a franchise in no way affects the status of the ferry specifically with reference to its use and facility as an instrument used incidental to and as an aid to commerce (transportation).

That the ferry company has committed itself to a public undertaking cannot be denied. It not only holds itself out as ready and willing to serve the public generally but it, in fact, does so. When any such facility dedicates itself to the public interest, its legal status is determined by "virtue of its occupation and not by virtue of the responsibilities under which it rests." *Liverpool Steam Co. v. Phenix Insurance Co.,* 129 U.S. 397. The rationale of this principle of law is enunciated in *Munn v. Illinois,* supra.

Whether or not a license or franchise establishes the identity or status of a transportation facility was determined in *Bowles, Administrator v. Weiter,* 65 F. Supp. 359 (D.C. E.D. Ill.—1946). Weiter registered with the Public Service Commission of Illinois as a *contract carrier*. Under the Illinois statute the routes and rates of contract carriers were not regulated. However, in his operations, Weiter did not confine himself to contract carrier services but entered upon and performed *common carrier* services. Under the Price Administration Act, the rates of common carriers were exempt from price (rate) controls but contract carriers were not because their rates were not regulated by any governmental agency. Bowles, the Price Administrator, sought to subject Weiter to rate control because of his registration as a contract carrier. *Weiter had no franchise or license as a common carrier,* yet the Court in examining the factual situation, held Weiter to be exempt from the provisions of the Price Administration Act because he was, in fact, a common carrier. The Court stated:

> "In the instant case the defendant has held himself out to the public as a carrier of goods for hire—if Congress intended to exempt *only* those carriers whose rates were regulated, then it should have said so." (Emphasis supplied)

The Supreme Court has directly ruled on this proposition in *Vidalia v. McNeely,* 274 U.S. 676. In that case McNeely operated a ferry across the Mississippi River—one terminus being at Vidalia, La. He had no license or franchise. Apparently due to local politics, the town of Vidalia issued a license to another to operate a ferry at the same landing place as McNeely's and held McNeely

subject to penalty if he didn't get out. McNeely challenged the action under the "Commerce clause" and the Supreme Court said:

> "The complainant (McNeely) has full capacity to operate, and is operating a serviceable ferry — and the town is attempting to exclude his ferry on the ground that he is operating without a license. The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of its business, but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do."

That the Umatilla ferry operates in interstate commerce (between the states of Oregon and Washington) needs no elaboration. Admittedly, the states could invoke "police power" regulation under their recognized sovereign jurisdictions. But the primary power of regulating a public facility, operating in interstate commerce, lies in the Federal government under the Constitution. At least both of the states of Oregon and Washington have recognized this factor. In *Dean v. Washington Navigation Co.*, 59 Ore. 91, 115 Pac. 284 (1911), the Oregon Supreme Court stated:

> "It is not necessary to consider the question of whether the County Court of Wasco County (Ore.) could license a ferry crossing an interstate boundary."

The decision in the *Vidalia* case, *supra,* followed *Buck v. Kuykendall,* 267 U.S. 307. Buck operated a passenger motor carrier service between Portland and Seattle. The state of Oregon granted him a permit to operate in

Oregon, but the Public Service Commission of Washington refused to authorize operations in that state. Buck instituted Mandamus proceedings and when the case reached the Supreme Court of the United States, that Court held, in reversing the Supreme Court of Washington, that, under the circumstances there presented, the state's refusal to permit an interstate passenger carrier to operate within its boundaries was in violation of the "Commerce clause" of the Constitution.

Suffice it to say regulation does not create a public facility—but, when once an undertaking becomes affected with a public interest—regulatory control may follow as the exigencies of the circumstances permit or require.

Appellants contend that the Umatilla ferry is not a public ferry for the sole reason that it is not franchised or licensed (App. Br. 21). They cite *Canadian Pacific Ry. Co. V. United States,* 4 F. Supp. 851, affirmed on appeal, 73 F. (2d) 831, to support that position. Action against the Canadian Pacific was instituted by the United States to collect overtime pay for services rendered by inspectors in the U. S. Immigration Service. Recovery was claimed under Section 109(b), Title 8, U.S.C.A., which statute regulated the pay for inspection service rendered certain types of water borne vessels. A proviso exempted ferries from the provisions of the statute. This Court (9th Circuit) affirmed the District Court which allowed recovery upon the grounds that the operation, in fact, was not a ferry service falling within the proviso. In arriving at its conclusion, the Court recognized that traditionally and historically, public ferries

were created by and existed under a license issued by the Crown or a franchise granted by the sovereign. It further recognized that the state of Washington under Vol. 6, Title 32, Sections 5462-83, Rem. Rev. statutes "created" public ferries by franchise only after a finding of public necessity. The Canadian Pacific did not possess such franchise but the Court, in effect, held that the holding of a franchise was not determinative when it said

> "The type of vessels and the service rendered, *aside from the local license or franchise, obviously* determines the character of the service." (Emphasis supplied)

The Canadian Pacific was held not to be performing a ferry service, not because of its failure to own a franchise as a public ferry, but because of other specific reasons. In other words, this Court held the operation to be subject to the statute, and not within the exemption, because of the nature of the actual service rendered and not because of the failure to own a franchise.

The sovereign rights of states to license or franchise ferries is universally recognized so long as the regulation imposed is not an undue burden on interstate commerce. *St. Clair County v. Interstate Sand & Car Transfer Co.,* 192 U.S. 454. Historically, the regulation of ferries in Oregon arises in recognition of two factors, namely, (1) the protection of the prior rights of riparian owners, and (2) the necessity of reserving for the purpose of a ferry operation the state's right of condemnation of land for ingress and egress to the ferry landing. *Cason v. Stone,* 1 Ore. 39, *Gant v. Drew,* 1 Ore. 35, *Mills v. Learn,* 2 Ore. 215 (1852), *Hackett v. Wilson,* 12 Ore. 25, 6 Pac. 652.

The substance of the foregoing Washington and Oregon authorities is that a franchise is a privilege. The Crown originally extended the privilege to its subjects for the purpose of raising revenue for personal use. In the state of Washington any instrumentality connected with transporation is subject to proof of "public necessity" before the privilege is granted. Hence, a superior importance attaches to a franchise in that state. Oregon does not regulate any form of transportation with the same degree of compliance as the state of Washington. Suffice it to say, neither state has seen fit to exercise any regulatory control over the Umatilla ferry, and their failure to do so cannot be construed as a refusal to exercise a right which lies within the states' sovereignty[1].

III.

THE UMATILLA FERRY IS A PUBLIC HIGHWAY WITHIN THE PURVIEW OF SECTION 206(a) OF THE INTERSTATE COMMERCE ACT (49 U.S.C. 306(a))

On either side of the Columbia River, and in close proximity to where the ferry lands, there is an estab-

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[1] We are mindful that this Court in the *Canadian Pacific* case, *supra,* after reviewing the decision in *Vidalia v. McNeely, supra,* and other related cases said: "These cases do not sustain the contention that a franchise was not an essential element of a ferry." We interpret that language to mean that, under the Washington statutes, consideration should be given to this factor. But in view of the ultimate holding in that case, we believe the Court recognized the validity of the principle enunciated in the Vidalia case—that is, that a state may not require a license of a ferryman before he could carry on his business in interstate commerce.

lished public highway. On the Washington side its distance is some 1500 feet and on the Oregon side, it is some 500 feet (R. 17). The ferry company holds a lease to the lands over these respective areas and maintains them for ferry traffic (R. 17). The ferry company, by posted signs along the highways on both sides of the river, advertises the ferry service as a connecting and short-cut route to all points north-east-west, etc. (R. 18). The state of Oregon has, likewise, advertised the ferry service (R. 19).

That a highway can be any way within a state is defined in the Act (Section 303(a) (12), Title 49, U.S.C.A.). That a ferry is a distinct and recognized "way" as an instrument of commerce has been established and supported by the courts for time immemorial. A highway is a public way for use of the public in general, for passage and traffic without distinction. *McCarter v. Ludlum Steel and Spring Co.* (N.J.), 63 A. 761, 766, *Detroit International Bridge Co. v. American Seed Co.* (Mich.), 228 N.W. 791, 793. A ferryboat is as much an instrument of commerce as a bridge. *New York Central R. R. v. Board of Hudson County* (N.J.), 65 A. 860. In the early case of *New York v. Starin* (N.Y.), 12 N.E. 631, the Court said:

> "In a general sense, a ferry is a highway over narrow seas; and, further, a ferry is a continuation of a highway from one side of the water over which it passes to the other and is for the transportation of passengers or travelers and such property as they may have with them."

The case of *New York v. Starin, supra,* was cited with approval in *St. Clair County v. Interstate Sand &*

Car Transfer Co. (1904), *supra*. In *The Nassau* (D.C. N.Y. 1910), 182 Fed. 696, the question involved was whether or not a municipal ferryboat plying in New York bay was subject to a Federal statute pertaining to safety of operation. The trial court held the service performed not to be within the statute, which holding was reversed on appeal (188 Fed. 46). The reversal was based upon the type of boat used as defined within the statute and not because it was or was not a ferry. In describing a ferry service, the Court said:

> "The control of the ferryboat is limited and applies only to matters connected with the navigation of the boat and the furnishing of a place or highway for the purpose of transportation (cases cited). In this way the rights and responsibilities of a ferry are much nearer those of a toll bridge or road, where the charge is for the right to use—that is to enjoy—a public highway, including propulsion . . ."

In *United States v. Myers*, 99 Ct. Cl. 158, in a case involving overtime pay for custom inspectors at the Port of Detroit, the Court said:

> "There is no difference in purpose, as a means of conveyance of persons, baggage, or freight from one side of a river to another between a ferry, a bridge and a tunnel."

That a ferry is a way and the continuous part of a road or highway has been recognized in both Oregon and Washington. *Mills v. Learn, supra, Hackett v. Wilson, supra, United States v. Puget Sound Navigation Co.* (Wash., D.C.), 24 F. Supp. 431, *United States v. King County* (1922), 281 Fed. 686.

Appellants admit that the meaning of the term "highway" "may be limited to its strict sense by the subject

matter of the statute in which it is employed." (App. Br. 10). The statute here under consideration is one designed for the sole purpose of regulating transportation; and, by express definition it sought to regulate transportation, in interstate commerce, on "the roads, highways, streets and ways in any state." Where else could transportation be performed than on a "road", "highway", "street", or "way". Furthermore, in the application of a Federal regulatory statute, no authority is required to support the proposition that the government is not bound by specific usage or definition of particular matters by the separate states. The statute was made all inclusive for the specific purpose of avoiding such a situation as the appellants now contend. What the Congress said is that regulation shall extend to any public road, public highway, public street, or public way in any state.

A very appropriate and succinct statement relating to the point raised here is contained in the early case of *Gloucester Ferry Co. v. Pennsylvania* (1885), 114 U.S. 196. Although that case involved the right of a state to tax a ferry business, the Court observed:

> "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose . . . The power to regulate that commerce . . . (is) vested in Congress. . . . The power also embraces within its control all instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

Of the cases cited by appellants in support of the proposition that "This Ferry is not a Highway" (App.

Br. beginning pg. 12), we have no particular quarrel. Some clarification is required, however. We do not contend that the physical ferry, itself, is a highway, but we do contend that the service offered by the ferry company is a highway service across the Columbia River because it furnishes travelers by vehicle the facility of a continuous and connecting route between the highways of Oregon and Washington.

Appellants cite *Menzel Estate Co. v. City of Redding* (Cal), 174 Pac. 48, as authority for the proposition that "the ferry itself is not a public highway even though the place where it is used may be one in a literal sense" (App. Br. 12). The controversy in that case arose over interpretation of a state statute concerning "free public highways". The Court held that a ferryboat, itself, could not be considered a public highway in contemplation of the statute *"though the place where the boat is used is a public highway in the sense that it is a continuation of the highways with which it connects."* (Emphasis supplied)

Appellants cite *Norton v. Anderson* (Wash), 2 Pac. (2d) 266, as authority for the proposition that "ferries and ferry premises including approaches are not highways or parts of highways." That case arose on a claim for personal injuries suffered by a person while using the passageway between the ferry landing and the city street. King County, one of the defendants, owned the ferry property but had leased it to Anderson, the other defendant, for operation. King County defended on the ground that the passageway was a highway and as such,

in its governmental capacity, it owed a limited duty to the injured pedestrian. The Court held the passageway was not part of the *ordinary* street or highway but it was *a reasonably necessary adjunct to the ferry system* and belonged to the county. The county was held jointly liable because under its contract with Anderson it had assumed responsibility for maintenance of the ferry property. We do not contend that the approaches of the Umatilla ferry, on either side of the river, are parts of the highways system of the states— they are an integral part and a necessary adjunct to the ferry operation.

In *Corbaley v. Pierce County* (Wash.), 74 Pac. (2d) 993, cited by appellants (Br. 14), a suit arose for a death which occurred on the ferry "slip". The ferry operation was leased by the county to private individuals. The Court held that the slip was part of the leased ferry operation (and not a county highway). The county was absolved from liability on the ground that the death occurred on ferry property and the sole responsibility under the lease contract resided in the ferry operators.

Appellants cite *United States v. Canadian Pac. Ry., supra,* (App. Br. 16), also, as authority for the proposition that a ferry must necessarily provide a continuous link between or a continuation of highways. We think the Umatilla ferry does exactly that. In that case the Court said (pg. 853):

> "A ferry may be said to be a necessary service by specially constructed boat to carry passengers and property across rivers or bodies of water from a place on one shore to a point conveniently opposite on the other shore and in continuation of a highway

> making connections with a thoroughfare at each terminus."

The Canadian Pacific was held not to be operating a ferry because the service it performed was in conventional sea-going vessels traveling at a distance of some 145 miles and because the service was advertised and conducted as a scenic "Triangle Tour" not designed to connect with any highways.

In connection with this point, appellants argue, further, that the ferry service cannot be a continuation of a highway because the chain of continuity has been broken by the "private" nature of the approaches on either side of the river. They claim: "They (approaches) were under the exclusive ownership and control of the ferry, subject only to the rights and uses of passengers and patrons of the ferry. Hence, they were not public highways but private property over and on which only patrons of the ferry had a right of passage." (App. Br. 20). This is solely an argument of convenience; it has no foundation in either fact or law. By the very nature of a ferry the approaches are a necessary incident to its operation. Particularly is this true here where the Columbia River is subject to both tidal influences and seasonal flood conditions. The approaches are an integral part of the ferryman's responsibility. This duty has been aptly recognized in *Calhoon v. Pittsburg Coal Co.*, 194 Atl. 768, where the Court said:

> "A ferryman must maintain safe and suitable landing places for the ingress and egress of passengers and teams . . . The duty as to the safety of landings applies not only to the immediate means of getting

> on and off the boat, but requires the ferryman to furnish safe passageways between the ferry houses and the streets."

The necessity and corresponding right of a ferryman to maintain passageways from the landing place to the nearest street was recognized in *Vidalia v. McNeely, supra*. Also in cases cited by appellants, *Norton v. Anderson, supra* (App. Br. 13), *Corbaley v. Pierce County, supra* (App. Br. 14).

IV.

APPELLANTS OPERATED WITHIN THE STATE OF OREGON OVER PUBLIC HIGHWAYS

The two carriers, under the arrangement previously referred to, served the McNary Dam site by boarding the ferry in Washington and landing on Umatilla Island, Umatilla County, Oregon, and thence to destination by use of United's privately constructed roadway (R. 20)[2]. Umatilla Island to all intent and purpose is owned by the United States Government, at least the government has reserved and exercised jurisdiction over that area; and, the trial court so found (R. 22).

At this point it is necessary to correct various errors of appellants both as to the facts and law. In their brief,

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[2] United's private roadway must not be confused with the roadway improved and maintained by the ferry company to serve patrons between the landing place and the state highways. United's road extended due eastward along the Columbia River where it entered the McNary reservation. The ferry road extends due south and is wholly without the reservation.

at page 19, appears this statement: ". . . the ferry on the Oregon side docked on property of the United States Government, namely, Umatilla Island, *which was a part of the McNary Dam reservation.*" (Emphasis supplied). The appellants persistently attempted to prove before the trial court that Umatilla Island was part of the McNary reservation. They failed to do so because it is not a fact. The trial court found Umatilla Island was government property and that the McNary Dam site "is *also* on government property." (R. 22) (Emphasis supplied).

Again, at page 27 of appellants' brief, they state: "The facts, as found by the trial court on page 22 of the Transcript of Record, disclose that the operation was performed entirely within the confines of the reservation for the reason that the Columbia River was wholly within the McNary Dam reservation. Therefore at no time was Appellant United within the State of Oregon." Appellants would want this Court to believe that the ferry operated wholly within the reservation. The trial court did not so find. There is not one single word in the record or in the Court's opinion to support such a flagrantly erroneous statement. The ferry operation is conducted wholly and totally *outside* of any part of the dam reservation, (Stip., par. III, R. 17)—in Oregon, in Washington and across the river. Apparently, appellants hope to supply some basis for their contention (and further erroneous statement) that the transportation was "a movement from *a state to a federal territory*. As the trial court found . . ." (App. Br. 26). The only finding that a federally owned territory was involved in this pro-

ceeding is that the ferry docked on the Oregon side on land owned by the government—Umatilla Island (R. 22).

It would appear unnecessary to pursue this argument of the appellants further. Even granting that the ferry operated wholly within the McNary Dam reservation or assuming that there was some "reservation" extending across the river attached to the government owned Umatilla Island, these circumstances would not change the result because of the express wording of the statute. Section 306(a) extends jurisdiction of the Commission to transportation "on any public highway, or within any reservation under the exclusive jurisdiction of the United States . . ." The trial court so found (R. 23-24).

The Commission has held on numerous occasions that transportation over a public highway within a government reservation falls within the provisions of the above section. In *Missouri-Pacific Transportation Co.—Extension,* 51 M.C.C. 545, the Commission said:

> "The transportation by motor vehicle in interstate or foreign commerce or over highways within a reservation such as is here involved is subject to the regulations provided in the Act to the same extent as is like transportation over other highways."

See also: *Gerard, Common Carrier Application,* 12 M.C.C. 109, *Garrett Freight Lines, Extension,* 49 M.C.C. 631, *Alexandria, Barcroft, etc., Extension,* 30 M.C.C. 618, and *M. J. O'Boyle and Son, Inc., Interpretation of Certificate,* 52 M.C.C. 248.

Another appropriate case on this proposition is *M. R. and R. Trucking v. Dean and Dove,* 49 M.C.C. 93.

In that case a carrier was authorized to serve within 75 miles from Bay Minette (Florida). Under this authority it could enter a military reservation within the scope of its certificate authority, and serve most of it on private military roads, but the principal service within the reservation was to "headquarters area" which was farther than 75 miles from Bay Minette. However, a public highway traversed the reservation and the carrier could not reach the "headquarters area" without using the public highway within the reservation. The Commission held that even though the carrier could lawfully enter the reservation, its service to the "headquarters area" was unlawful since it required the use of a public highway to reach that destination.

North Coast Transportation Co., Extension (Unprinted I.C.C. decision reproduced in 3 Federal Carrier Cases 30,019) cited by appellant has absolutely no applicability here. The Commission there held that it had no jurisdiction because the traffic was intrastate. It said:

> "Fort Lewis is not a state. It is located within and entirely surrounded by the State of Washington. *Commerce between Fort Lewis and other points within Washington which does not in its course cross the boundary of that state* does not come within the quoted definition of interstate commerce." (Emphasis supplied)

We would be remiss in our duty if we failed to present this case with complete finality. Under the facts and law, appellants did operate within the state of Oregon.

In the first place, navigable waters are retained by a state by declaration upon admission to the Union. Ore-

gon retained jurisdiction of the waters of the Columbia River within its dedicated, declared, and approved territorial boundaries. Under the *Admission Act,* Vol. 9, Sec. 1 (page 71), Oregon Code, the boundaries of the State of Oregon were described (so far as pertinent here) as:

> ". . . to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly to and up the middle channel of said river thereof near a point near Fort Walla Walla . . . including jurisdiction in civil and criminal cases upon the Columbia River and Snake River concurrently with states and territories of which those rivers form a boundary in common with this state."

Under Sec. 2 (page 72) the Admission Act provides:

> "The state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on said State of Oregon . . ."

Under Section 116, Vol. 8, Oregon Code, is an express statute regarding control of waters within the state including the Columbia River. One exception is noted and it refers to an area in and about the Celilo Falls which area was reserved to Celilo Indians under a fishing treaty between the Indians and the federal government. This area is far removed from the area here under consideration.

One of the first cases to enunciate the principle of state jurisdiction over waters within its boundaries is *Shively v. Bowlby,* (Oregon-1894) 152 U.S. 1. This case held that the sovereign right to waters and lands below high water mark was retained by the states. This principle was later followed in *Atkinson, et al. v. State Tax*

Commission of Oregon, 303 U.S. 20. That case involved the issue of whether or not the workers living within the Bonneville Dam reservation were subject to the State of Oregon income tax. The Court in holding that they were subject to the state tax said:

> "The state retained jurisdiction of the area within its boundaries including the North Channel of the Columbia River, which is within the territorial limits of Oregon."

In the second place, the withdrawal of "Umatilla Island" by the Secretary of the Interior did not affect the state's primary title and jurisdiction over the waters of the Columbia River within the territorial limits of Oregon. A leading case on this proposition is that of *Borax Consolidated, Ltd., et al. v. Los Angeles,* 296 U.S. 10. In that case the Department of the Interior had withdrawn and exercised jurisdiction over Mormon Island, situated in the inner bay of San Pedro harbor. The Department subsequently issued a patent on the island to a private individual and through successive transfers title was obtained by the Borax Company. The City of Los Angeles questioned plaintiff's right to the use of the shores of the Island between the high and the low water mark and brought suit to quiet title. The Court held that tide lands belonged to the city on the grounds that the tide lands were retained by the state originally and the Department could not convey any more land than it held in the first instance. The Supreme Court, in its decision, cited with approval the *Shively* case, *supra.*

Accordingly, the area of the Columbia River between the North Channel and where the ferry lands on Uma-

tilla Island was and is within the territorial boundaries of the state of Oregon and subject to that state's jurisdiction—subject of course to Federal regulations affecting all navigable waterways. Appellants traversed this area in the transportation of freight.

One further matter requires comment. Appellants argue that the trial court erred in that "it applied a liberal construction to a statute that was penal in nature" (App. Br. 7). In the first place, there is no evidence of record urging a liberal construction of the statute and the trial court, in its opinions, never at any time made any reference to the necessity of "liberalizing" the construction of the statute or that its decision was based upon a liberal interpretation in any manner.

In the second place, we, generally, agree with that basic proposition of law, but with the following reservation, assuming, of course, that the statute under consideration is a penal one. In *United States v. Fruit Growers Express Co.*, 279 U.S. 363, cited by appellants (Br. 7) in support of the proposition, the Court did hold that penal statutes must be given a *reasonably strict construction to effect the particular purpose Congress had in mind.* We think that case is particularly appropriate here. The Court there had before it two penalty provisions of the *Interstate Commerce Act,* Part I. The Court was required to construe both sections with relation to each other. We refrain from a long quotation, but the Court in reaching its decision (page 368) considered "the general object of the statute", "the intent of the penal provisions", that the penal provisions "were intended to be an ultimate protection to shippers"—other

than that the defendant was "entitled to a reasonably strict construction of the language used to effect the particular purpose that Congress had in mind."

Also, appellants state (Br. 9): "No authority will be implied in a matter involving jurisdiction." Appellants, defendants below, based their motion to dismiss on the ground that the government had failed to prove a violation of Section 306(a). That section is not jurisdictional—but is a declaratory section within a general regulatory statute.

CONCLUSION

We contend that appellants in using the Umatilla ferry to transport commodities between Benton County, Washington, and the McNary Dam site, Umatilla County, Oregon, performed a transportation service on a public highway in Oregon as defined in Section 306(a), Title 49, U.S.C.A.

Therefore, it is submitted that the order of the District Court is denying appellants' motion to dismiss was correct and that this appeal should be dismissed.

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